United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2367

ITT WORLD DIRECTORIES, INC.,

Plaintiff-Appellant,

-against-

CIA. EDITORIAL de LISTAS, S.A. and
EDITORIAL de GUIAS LTB., S.A.,

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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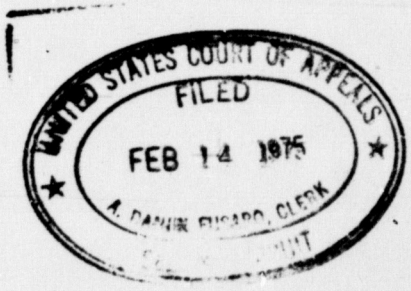

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ARGUMENT

Defendants begin their argument by characterizing this as "a frivolous appeal" (Brief for Defendant-Appellees ["Deft. Br."] p. 2) Nevertheless, for some 27 pages defendants purport to state (Id., pp. 2-11) and analyze (Id., pp. 11-17) the facts proven by plaintiff and stipulated by the parties; argue the merits of an arbitration procedure which was never sought (Id., pp. 18-22); and finally discuss legal authorities having nothing to do with this case. (Id., pp. 23-27).

Despite the diffusion of defendants' arguments, the focus of this case remains clear -- the amount plaintiff was obligated to pay for the net worth of the two companies it had acquired from defendants. The written agreement of the

parties (Pltf. Ex. 2) provided for such payment to be paid on the basis of the opinion of Arthur Andersen & Co. Plaintiff's payment was in excess of such amount and it sues for reimbursement of the excess.

Brief comment may be made in reply to the arguments by defendants:

1. Defendants' requirement of two pieces of paper -- Defendants concede that "it was possible to extract from the report an amount which, in the view of Arthur Andersen & Co., represented the combined tangible net worth of the two companies....[I]t could be concluded that Arthur Andersen & Co. believed the combined tangible net worth of the companies to be approximately 3,000,000 escudos, or $138,224." (Deft. Br. pp. 7-8).

This concession would seem to end the appeal inasmuch as the parties had agreed that the correct payment was to be based on Arthur Andersen's opinion.*

Defendants argue, however, that this opinion must be scrapped because it did not appear in a separate piece of paper. In other words, defendants contend that the Arthur

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* Thus there is no relevance to defendants' references to Arthur Andersen's audits of earlier years or its preliminary report showing a negative net worth (which would have called for a repayment by defendants to plaintiff).

Anderson report in evidence (Pltf. Ex. 3, E-23, 24) cannot contain the auditors' "certificate" on which payment was to be made, because the certificate could not be contained within the same report as the balance sheet. But the only evidence of record is that this report is indeed the "certificate" upon which payment was to be based (103a). Moreover, defendants point to nothing other than the Arthur Andersen report as the basis of payment; they simply prefer management's figures contained in that same report. In other words, defendants contend that the correct basis for payment was the 14 million escudos set forth in the balance sheet portion of the report as management's figures, rather than the 3 million escudos which Arthur Andersen set forth in the opinion portion of its report.

It was, of course, the auditors' opinion and not management's which governed this payment. That they both were contained within the same covers cannot be determinative. To insist that Arthur Andersen prepare two pieces of paper, rather than one, is to elevate form over substance in a way that cannot be sanctioned by this Court.

2. The Uncalled Witnesses - Defendants make much of the witnesses who were not called at the trial (e.g., Defts. Br. pp. 10, 12). Absent from this discussion is mention of the role of Robert Arthur, defendants' executive who represented defen-

dants in the activities pertinent to this action. The testimony of Mr. Arthur (who was present in Court at the trial) was promised by defendants at the trial (47a, 50a) to show that the parties had departed from their written agreement and that the payment made was based on such "substituted agreement".*

Plaintiff has conceded from the outset that it can offer no explanation of how the mistake occurred. This is in accord with common experience -- it is in the nature of mistakes that people do things which they do not mean to do without being able to give any rational explanation. Defendants would apparently consider the situation dramatically different (and presumably governed by the principles applied in Gulf Oil Corp. v. Lone Star Producing Co., 322 F.2d 28 (5th Cir. 1963)) if plaintiff had put a witness on the stand who testified baldly: "We made a mistake -- I can't explain how it happened -- but we made a mistake". Plaintiff does not believe that the result in this law suit should turn on the presence or absence of such a conclusory statement of the ultimate issue to be decided by the Court. More helpful and significant is the contemporaneous documentary evidence that plaintiff purported to make its payment "per A.A. [Arthur Andersen] report," as required by the purchase agreement (Pltf. Ex. 1, p. 21, E-8)**.

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* As noted in plaintiff's main brief, the trial court seems to have erroneously accepted, without proof, this substituted agreement because of the "possibility" it existed (Brief for Pltf.-Appellant, p. 19).

** Defendants failed to rebut this evidence, even though the former employee of plaintiff who furnished this written evidence had been examined on deposition by defendants and had apparently been subpoenaed by defendants for trial.

3. The Arbitration Smoke-Screen - Defendants repeatedly argue that a procedure was provided in the acquisition agreement for disputing the Arthur Andersen opinion. That is certainly true. But the procedure required CELSA to serve written objections within 20 days after receiving the report. It is clear that no such written objections were made. Accordingly, the opinion of Arthur Andersen is indeed "final and conclusive" (Pltf. Ex. 2, §3.6, 3d full paragraph).

Moreover, when we examine what written statements were furnished by defendants, we find that instead of serving such written objection, defendants did quite the opposite. They wrote a letter to Arthur Andersen expressly admitting that because "the Company has not followed a consistent policy with respect to providing for depreciation on its machinery and equipment," the Company's accumulated depreciation "is estimated to be understated by approximately Esc: 5,000,000 as of May 31, 1969," as a result of a generally accepted accounting basis consistently applied. (Pltf. Ex. 4, E-37)

Thus defendants were acutely aware of precisely what Arthur Andersen was doing. There was, accordingly, no excuse for their failure to make written objection. Indeed, had they done so there would have been an opportunity for confirmation of the Arthur Andersen report. It is, accordingly presumptuous for defendants to argue what they "would have" argued at an

arbitration (Defts. Br., p. 18). By not serving objections at the appropriate time, defendants deprived plaintiff of an opportunity to confirm the opinion of Arthur Andersen contemporaneously. As stated above, the result is that Arthur Andersen's opinion became "final and conclusive" under the agreement.

4. Defendants' Legal Authorities - Defendants seem to part company with the trial court on the applicable legal principles and continue to mis-read the law governing this case. They confuse the law on reformation or rescission of a contract with the law governing mistaken overpayment by plaintiff pursuant to a contract under which both sides are acting. Reformation or rescission deal with an attempt to change or avoid an agreement because it does not reflect a true meeting of the minds. Such body of law deals with mistakes made in connection with entering into agreements and has nothing to do with mistakes in performance, which is this case.*

For example, it is of no assistance to the resolution of this case to cite and quote from Van Curler Development Corp. v. City of Schenectady, 59 Misc. 2d 621, 300 N.Y.S. 2d 765 (Sup. Ct., Schenectady Co. 1969) (Defts. Br., p. 25) No one would quarrel with Van Curler's denial of rescission to the seller of real property who unilaterally makes a mistake "consisting of

* For this reason, the section of the Restatement of Restitution which defendants claim is relevant (§12, See Deft. Br. p. 25) deals with "Unilateral Mistake in Bargains," while the pertinent section 20 discussed in plaintiff's main brief (Brief of Plaintiff-Appellant, p. 9) deals with "Mistake as to Extent of Duty or Amount Paid in Discharge Thereof."

an erroneous idea as to the value of the various properties". 300 N.Y.S. 2d at 773. Moreover, plaintiff here does not deny that its officers understood and were aware of the contents of the Arthur Andersen report -- a finding of fact which defendants argue was "totally ignored by appellant in its brief" (Deft. Br., p. 9). It is precisely plaintiff's earlier awareness of the Arthur Andersen opinion in its report which makes payment at variance with this opinion impossible to explain except by way of a mistake. Cf. Gulf Oil Corp. v. Lone Star Producing Co., supra; Manufacturers Trust Co. v. Diamond, 17 Misc. 2d 909, 186 N.Y.S. 2d 917 (App. T. 1st Dept. 1959).

The payment, which was concededly made on the basis of the report, was erroneous. The report required a payment of $138,224; the payment, however, was $492,221. The difference is the $353,997 for which reimbursement is sought.

CONCLUSION

For all of the foregoing reasons and all of the reasons set forth in the Brief for Plaintiff-Appellant, the judgment of the District Court should be reversed and judgment rendered in favor of the plaintiff.

Respectfully submitted,

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